

THE
S P E E C H E S
OF THE
JUDGES of the Court of EXCHEQUER,

Upon granting a NEW TRIAL,

IN THE CASE OF

Capt. *Evelyn Sutton*, against Com^{re} *George Johnstone*;

On the 30th Day of JUNE, 1784;

TOGETHER WITH

Mr. Baron EYRE's S P E E C H,

On the MOTION to arrest the JUDGEMENT,

On the 15th Day of JUNE, 1785.

Taken in Short Hand, by JOSEPH GURNEY.

L O N D O N :

PRINTED FOR T. CADELL, IN THE STRAND.

MDCCLXXXVI.

[Price 1s. 6d.]

STEPHEN C. HES

JURIES of the Court of Record

IN THE CASE OF

THE CASE OF

THE CASE OF

THE CASE OF

TOGETHER WITH

THE CASE OF

Rec. May 15, 1900.

THE CASE OF

The ARTICLES of WAR upon which the Charge against Captain SUTTON was founded.

Act 22 GEO. II. Cap. 33.

ARTICLE XI.

EVERY Person in the Fleet, who shall not duly observe the Orders of the Admiral, Flag Officer, Commander of any Squadron or Division, or other his Superior Officer, for assailing, joining Battle with, or making Defence against any Fleet, Squadron, or Ship; or shall not obey the Orders of his Superior Officer as aforesaid, in Time of Action, to the best of his Power; or shall not use all possible Endeavours to put the same effectually in Execution, every such Person so offending, and being convicted thereof by the Sentence of the Court Martial, shall suffer Death, or such other Punishment, as, from the Nature and Degree of the Offence, a Court Martial shall deem him to deserve.

ARTICLE XIV.

If, when Action, or any Service shall be commanded, any Person in the Fleet shall presume to delay or discourage the said Action or Service, upon Pretence of Arrears of Wages, or upon any Pretence whatsoever, every Person so offending, being convicted thereof by the Sentence of the Court Martial, shall suffer Death, or such other Punishment, as from the Nature and Degree of the Offence a Court Martial shall deem him to deserve.

ARTICLE XXII.

If any Officer, Mariner, Soldier, or other Person in the Fleet shall strike any of his Superior Officers, or draw, or offer to draw, or lift up any Weapon against him, being in the Execution of his Office, on any Pretence whatsoever, every such Person being convicted of any such Offence, by the Sentence of a Court Martial, shall suffer Death. And if any Officer, Mariner, Soldier, or other Person in the Fleet shall presume to quarrel with any of his Superior Officers, being in the Execution of his Office; or shall disobey any lawful Command of any of his Superior Officers, every such Person being convicted of any such Offence by the Sentence of a Court Martial, shall suffer Death, or such other Punishment as shall, according to the Nature and Degree of his Offence, be inflicted upon him by the Sentence of a Court Martial.

*

In the Exchequer, { EVELYN SUTTON, Esq;
VERSUS
GEORGE JOHNSTONE, Esq;

THE
SPEECHES of the JUDGES

On granting a New Trial.

Lord Chief Baron SKYNNER.

THIS is an Action which has been brought against the Defendant, Commodore *Johnstone*, for having maliciously, and without probable Cause, charged the Plaintiff, Captain *Sutton*, with delaying and discouraging the Public Service, by disobeying his verbal Orders and public Signals, in not causing the Cable of the Ship which he commanded to be cut or slipped, immediately after his going on board her, in order to put to Sea after the Enemy; and also for falling astern, and not keeping up in the Line of Battle, according to the Signal then abroad, after the *Isis* had joined the Squadron, &c. and that upon this Charge he arrested him, and kept him in Confinement for a long Space of Time, until he was afterwards brought to a Court Martial, where he was honourably acquitted of this Charge that was made against him.

It seems to have been agreed by the Counsel on both Sides, that the Directions which, upon the Trial of this Cause, I gave to the Jury, were right: namely, That they must be satisfied that this Action had for its Foundation Malice on the Part of the Defendant towards the Plaintiff, and that they must be satisfied that the Charge made by Commodore *Johnstone* against the Plaintiff, was founded in a malicious and wilful Design to ruin and oppress him, without any reasonable Ground or Cause for so doing. The Situation of Commodore *Johnstone*, as Commander of the Fleet, was such, as made it his Duty to superintend the Conduct of all the Officers under his Command; to suspend, to arrest, and to bring to Trial, all such of whom he saw an apparent and reasonable Cause to judge guilty of any Disobedience to the Orders he had given; and if, in arresting, imprisoning,

or charging any Officer under his Command, he has proceeded under the Sense of his Duty to the Public, to the Discharge of that Power with which he was entrusted, and has done it without any ill or malicious Designs, but with Uprightness and Integrity, he is not answerable for the Event that such a Charge shall produce, whether the Person whom he so accuses shall finally be found guilty or not; I say, if he has acted with Uprightness and Integrity, he is by Law protected, and such an Action as this is not to be maintained against him. The Enquiry then, upon the present Occasion, must be, What was Commodore *Johnstone's* Conduct upon this Occasion? And in order to consider of that properly, as far as it is applicable to the present Enquiry, it will not be necessary for me to enter into a minute Consideration of all the Evidence that has been given; because I think it must depend upon so much of his Conduct as particularly related to what passed between him and Captain *Sutton*, and to Captain *Sutton's* Conduct at the Time to which the Evidence is particularly applied; namely, after the Time at which the Engagement ceased, and Commodore *Johnstone's* Orders were given to *Sutton*, and the subsequent Part of that Day. Now it appears, that Commodore *Johnstone* had thrown out a Signal for all Captains to come on board, soon after the Engagement ceased. The very exact Time at which the different Signals were made, seems to have been differently spoken of by the Witnesses, and it is impossible but that upon such Occasions, and respecting such Circumstances as that, there must be a Difference of Recollection. Captain *Sutton* did not come on board so soon as the other Captains did, but that Delay is accounted for by his not having a Boat belonging to his Ship in which he could entrust himself to go. He went on board the Commodore's Ship, and there he received the Orders of the Commodore, to get his Ship ready and go to Sea, for he meant immediately to engage the Enemy; and the Directions appear to have been given on the Part of the Commodore without any Appearance of Anger or Resentment which at that Time affected him towards Captain *Sutton*. Captain *Sutton* applied himself, as it seems, to Captain *Home*, the Captain of Commodore *Johnstone's* Ship, and told him, his Officers were of Opinion that his Ship could not immediately obey that Order and go to Sea, and desired that he would mention it to Commodore *Johnstone*: He declined so doing; but desired that Captain *Sutton* would himself acquaint the Commodore with the Circumstance: And when he applied to the Commodore, and told him what his Officers Opinion was, Commodore *Johnstone* then immediately told him, "I don't mind the Reason which you have given, I have heard those Reasons before; the Opinion of your Officers is immaterial: You have my positive Orders to go to Sea; and as to the Risk, if there is any, I take it upon myself." And it appears, that those Orders, so repeated, were given or repeated to him with some Warmth. Captain *Sutton* went immediately on board his Ship. In the mean Time it appears, from the Evidence given on the Part of Captain *Sutton*, because it appears from the Letter read by him, that Captain *Home* had advised Commodore *Johnstone* to supersede him, or to send some Officer of his own to take the Command of that Ship, from the Appearance that Captain *Sutton* had then given of Backwardness to obey his Orders. Commodore *Johnstone* did not listen to that Advice, but said, it was improper for him to take that Step before some Overt-act had been done; and there would be no Authority in the Ship if he should send another Person there to take the Command.

mand. Commodore *Johnstone* therefore refused to listen to that Advice so given to him, and permitted Captain *Sutton* to continue in the Command of his Ship. The Orders which he had so given were not obeyed for a considerable Space of Time. In the mean time, Captain *Hawker*, the Captain of the *Hero*, came within Hail of Commodore *Johnstone*, and delivered to him a Message from Captain *Sutton*, signifying that he was repairing his Damages, and would come out as soon as they were finished, or as soon as he could. Commodore *Johnstone* appears then to have continued in the same Degree of Dissatisfaction at Captain *Sutton's* Conduct, which he had adopted upon Captain *Sutton's* Representation to him of the State of the Ship, said, with some Degree of Warmth, I don't care for his Repairs, or something to that Purpose, he has my positive Orders to come out. Many Signals were made by firing of Guns to him, and Captain *Sutton* did not come out until a considerable Time afterwards. The Witnesses have differed so much in the particular Time, that I will only observe, that it was not till a considerable Time after that Message had been delivered to him. When he came out and joined the Commodore, it appears that what passed between him and the Commodore was accompanied still with some Degree of Dissatisfaction remaining with Commodore *Johnstone* at the Time, because, though the Witnesses have given different Accounts of what passed berwixt *Johnstone* and *Sutton*, yet they all shew manifestly, that there was a Dissatisfaction on the Part of Commodore *Johnstone* by the Language which he then used to him; because it is admitted, that Captain *Sutton* answered to him, He would, or he did make no Excuse; Commodore *Johnstone* must have said something that led him to give an Answer of that Kind to him. After the Line of Battle had been broke, and the Resolutions had been taken not to engage the Fleet, it is said by some of the Witnesses, that Commodore *Johnstone* hailed his Ship, as enquiring after the Situation personally of Captain *Sutton*; but the Intent of Commodore *Johnstone*, manifestly to be drawn from his hailing, was to enquire after the State of the Ship. On the next Morning, Commodore *Johnstone* appears to have gone on board the Ship which Captain *Sutton* commanded; he there made an Enquiry into the State of the Ship from Captain *Sutton* himself, and took from Captain *Sutton* a Report of the Damages which the Ship had received; which Report was in Writing given to him by Captain *Sutton*, which had been made, as it appeared, by the Boatswain: And it is in Evidence, that at the Time he so went on board to make the Enquiry, he then told Captain *Sutton*, that he did intend to put him under an Arrest. Now these are the Circumstances that passed relative to the Disobedience of the Order not coming out. During the Course of that Day, and of the following Morning, the Squadron separated, as it appears. Immediately after this, Commodore *Johnstone* went to *Port Praya* in the *Diana* Frigate, where he arrived on the 19th. Captain *Sutton* arrived on the 21st, and upon the 22d he was put under an Arrest. Now it appears to me, that these Circumstances, thus stated, and without Doubt to be collected from the Evidence, do afford a *probable Case*, an apparent Reason for Commodore *Johnstone's* suspending and putting under Arrest, and charging Captain *Sutton* with this Disobedience, and go a great Way, as it seems to me, to exclude the Presumption of Malice; because it appears, that the first Orders were given in the most friendly Manner; that immediately upon

Captain *Sutton* hesitating about the Orders, the first Dissatisfaction of Commodore *Johnstone* was expressed, and that that was continued until the Time that he went on board the Ship on the 17th; and when, after an Enquiry, of Captain *Sutton*, as to the Grounds of his Conduct, he declared his Intention to put him under an Arrest. But it has been said that Commodore *Johnstone*, notwithstanding this apparent Disobedience of Orders, acted however rashly and indiscreetly, in pursuing Captain *Sutton* in the Manner he did, without putting him under an Arrest sooner, and without afterwards having made a farther and more particular Enquiry. It is said, that he ought to have put him under an Arrest as soon afterwards as he joined the Squadron, and after he came out; for that, as he had seen his Disobedience, and if he judged of it in the Manner he afterwards appears to have done, by making the Charge he did against Captain *Sutton*, he ought not to have suffered Captain *Sutton* to have commanded that Ship for the rest of the Day, and when he was going into Action. Now, I am not at all satisfied; it is a Subject a good Deal out of the Line of Men who are not in the Profession of the Sea; but it does not appear to me, that Commodore *Johnstone's* not delaying his Squadron to send an Officer to command Captain *Sutton's* Ship, and superseding him in the particular Situation he was then in, in his Line of Battle, going down to engage the Enemy, it does not appear to my Satisfaction at all, that Commodore *Johnstone* had not the same Opinion then of Captain *Sutton's* Conduct that he afterwards appears to have entertained, by charging him in the Manner he did, and bringing him to a Court Martial; and as to the Want of due Enquiry, it appears to me, that Commodore *Johnstone* made all that Enquiry which Captain *Sutton* could have a Right to require. He did not indeed, when he went on board, call Captain *Sutton's* Lieutenants around him to take their Account of Captain *Sutton's* Conduct; but Captain *Sutton* had, before Commodore *Johnstone* went on board the Ship, given his particular Reasons why he thought his Orders could not be obeyed; and Commodore *Johnstone* was to satisfy himself what the State of those Damages were which Captain *Sutton* had alleged, as the Cause of his not obeying his Commander in Chief. Commodore *Johnstone* could be an Eye Witness of them, as far as they were then capable of being viewed: He took the Account of them from Captain *Sutton*, and by a Report of the Boatswain of the Ship delivered to Captain *Sutton*, and given to Commodore *Johnstone*. Commodore *Johnstone* then had made all that Enquiry, which as between him and Captain *Sutton* could be necessary, because he had taken that Account which Captain *Sutton* thought proper to give. But it is said, that notwithstanding this, Captain *Sutton* appears, by the Sentence of the Court Martial, not to have been guilty of Disobedience of Orders, and therefore there was no probable Cause for charging him with such Disobedience. It was very truly said, that an Acquittal is very consistent with an Appearance, and with a strong Presumption of Guilt; and the Question upon this Occasion is not, whether Captain *Sutton* was actually guilty of Disobedience? but, whether Captain *Sutton* had, by his Conduct, afforded such Grounds to Commodore *Johnstone* as to presume a criminal Disobedience of Orders, as his (Commodore *Johnstone's*) Justification for charging him with it? It is impossible that we can know what were the Grounds, what were the Evidence upon which the Court Martial formed its Determination, for that Evidence cannot be before us. It appeared to me at

the Trial, that the Boatwain, who made out that Report which Captain *Sutton* gave to Commodore *Johnstone*, was prepared to give a larger Account of the Damages which the Ship had sustained, than had been given to Commodore *Johnstone*. Now, supposing a much larger Account of those Damages, and of a different Kind, to have been given to the Court Martial than that which was contained in the Report given to Commodore *Johnstone*, it might make the Acquittal by the Court Martial no Rule whatever to judge of Commodore *Johnstone's* Conduct, because he was to form his Opinion of the Conduct of Captain *Sutton* from the Account which Captain *Sutton* had himself given to him; and if, in fact, his Damages were so much larger as to justify the Disobedience of the Order which he had received, Commodore *Johnstone* could only form his Opinion by the Account of them which he had received; and it appears to me, from the Evidence which was given by all the Officers at the Time of the Trial, both those who were examined for Commodore *Johnstone*, and those who were examined for Captain *Sutton*, that the Disobedience of the Orders was a Ground for Commodore *Johnstone's* charging Captain *Sutton* in the Manner he did; for they all say, they should have held themselves bound (for that was the Purport of their Evidence) to obey those Orders, if they had been in the Situation in which Captain *Sutton* was. I profess then, to me it appears, that there was this apparent Ground, and probable Cause for Commodore *Johnstone's* charging Captain *Sutton* with the Offence that he did, and that he did it upon such Grounds as does, in a great Manner, exclude the Presumption of Malice. I don't mean to say, that there was not such Evidence of Malice as was properly to be left to the Jury, but I profess the Verdict as given upon it, was not so satisfactory to me as not to make me wish very strongly to have this Question reconsidered. It has been urged very strongly against this, that there were Witnesses produced in the Cause, on the Part of Commodore *Johnstone*, whose Testimony did import Malice from Commodore *Johnstone* towards Captain *Sutton*, and which was, from the Nature of it, to be applied precedent to the Time of making the Charge, namely, the Two Witnesses who swore that the Cable was cut on the Inside in the Morning at Nine o'Clock. It is said, this is Evidence of anterior Malice, because it charges Captain *Sutton* with an Act of Cowardice which he was not charged with before the Court Martial, and of which, to this Time, there had never been any Imputation. The Evidence of these Two Witnesses, supposing the Account they gave was to be considered as true, were intended to answer a very material Part of the Plaintiff Captain *Sutton's* Evidence, which he had given, and which he had made his Justification for not obeying the Orders, namely, that there had been occasioned a considerable Delay by the Cable having been cut Ten Minutes before the Ship got loose, on account of the Cable jamming in the Hawse-hole, as it was said, and there being a Necessity afterwards of cutting it on the Outside. Now, it has not been imputed to Commodore *Johnstone*, that he brought these Witnesses, knowing that they were to give a false Testimony: Nor can it, I believe, be presumed, that such were Commodore *Johnstone's* Intentions. Commodore *Johnstone* then brought these Two Witnesses, upon the Supposition that they would give Evidence very material to his Defence. These Witnesses were not believed; but it does not, in my Opinion, warrant a conclusive Argument in the Manner in which it has been

been drawn, that these Witnesses, thus produced, do afford positive Proof of anterior Malice in Commodore *Johnstone*. That not being the Case, I profess myself to think, there is no Reason drawn from the Circumstance of these Two Witnesses to prevent the Court granting this new Trial, which, I profess, I am very strongly of Opinion the Court ought to direct.

Mr. . Baron E Y R E.

THIS is an Action, the Ground of which is, that the Defendant had maliciously preferred an Accusation against the Plaintiff, for which there was no probable Foundation in Law and in Fact. The essential and the integral Grounds of this Action are *Malice and Want of probable Cause*; they are perfectly independent and substantive in their Nature, though in Evidence they are often confounded, though one is sometimes made use of to evince the other. If a Man were to prefer the most unfounded Charge that ever entered into the Imagination of the wildest Man, and could demonstrate that he had not done it upon the Motives of what the Law calls Malice, no Action could lie. On the other hand, if a Man were to prefer a grounded Charge upon the deepest Malignity that ever corrupted the human Heart, no Action would lie. It is very true, that if it appears to Demonstration that there is no possible Cause, the Want of a probable Cause also suggests the Want of a Motive for such a Prosecution, other than Malignity; and therefore it is, that the Want of probable Cause, clearly made out, brought home to the Knowledge of the Party, that he is conscious that there is no probable Cause will be received as Evidence of the other integral Ground of this Action, which is Malice; but unless it is not only true that there is no probable Cause, but it is also brought home to the Party who insists upon the Prosecution, that he knew there was none, though a Want of probable Cause may be established by such Evidence, Malice will not. What shall be deemed probable Cause should be a little understood. It is not an idle, totally unfounded Whim, of the honestest Man in the World, that would be received as probable Cause; but it is such Appearances of Foundation, as standing unexplained to the Party who conceives them, and who acts upon them, are reasonable and proper Motives for pressing the Accusation; and therefore it will always depend upon the particular Circumstances of every particular Case. In this Court, the Idea of probable Cause is, perhaps, more familiar than it is in any other Court in *Westminster-hall*; we oftener are called upon to judge of it; we certify probable Cause every Day. A Case this Moment occurs to my Memory; There was a Seizure of a Quantity of Gloves in a Glover's Shop in the *Strand*; they were seized, as being of *French* Manufacture and imported, being a prohibited Article. The Fact was, that they were cut in the *French* Fashion, with a Gore, which is peculiar to their Manufacture, and they were in *French* Packages; the Fact also turned out to be, upon Explanation, that the Glover, finding that it was necessary to impose upon fashionable People, who preferred having the

the best *French* Gloves, was obliged to have them cut in this Fashion, though pure *English* Manufacture, and obliged to get *French* Papers to pack them in, in order to satisfy the Taste of those fashionable People. The Fact being proved clearly, there was an End of the Seizure. The Goods were restored; but at the same Time the probable Cause of Seizure was clearly established: There was that which imposed upon the Judgment of the Officer, without any Imputation upon him; Appearances strong in his Favour: So there was a probable Cause for Seizure, which the Court had no Difficulty to determine upon; so there is nothing more distinct than that which turns out upon Explanation, and that Cause that the Party takes for granted, he shall maintain from the Fact he insists upon. I, for one, am extremely sorry that any Thing should have arisen between Officers of high Rank, in a Service of the utmost Importance to this Country the Naval Service, which should have called for an Application of those Principles which I have been just now laying down; and I am the more concerned, that it falls to my Lot, for one, to enter into the Discussion, inasmuch as it is a Subject which, from the Nature of it, I must be totally unacquainted with; the Discussion of which must be in Terms with which I am not familiar, which I do not comprehend; and the Observations upon which go so far, that as to One Half of this Evidence, I have not an Idea of what it imports: But, however, the Rights of the Subject, the Right of this Plaintiff, who applies to the Laws of his Country for a Satisfaction for that which he conceives to be a personal Injury done to him, in the Course of a great Naval Operation, are involved in this Naval Subject, and obliges, therefore, Men very incompetent to the Discussion of it to enter into it, and to deal with it as well as they may; I own I tremble for what I am doing, lest with Intentions to do Justice to the Parties, my Want of Acquaintance with the Subject, after all the Pains I have taken to inform myself of it, may lead me into some Mistake and Error. However, I am bound to act upon the best Lights before me, and must extricate myself out of those Difficulties as well as I can, and I hope without doing Injustice to the Parties. It must be taken in this Cause upon the Ground of the Acquittal of Captain *Sutton*, upon the Trial by the Court Martial, that Captain *Sutton* was not guilty of that Disobedience of which he stood accused by the Defendant, by not making sail in the Manner in which the Defendant charges he ought to have done; but the particular Grounds upon which that Acquittal proceeded in Evidence, are not before us; and therefore beyond the Fact that he must be taken to be Not Guilty, the Verdict of the Court Martial does not apply; and therefore it is like the Case that I referred to; the Verdict acquitting the Goods and restoring them to the Party, though very decisive as to the Ground of the Seizure, that they were not of *French* Manufacture, yet they did not go a Jot to determine whether there was or was not a probable Cause for the Accusation which brought them under Consideration for Seizure. So that it is impossible to carry the Verdict of the Court Martial beyond that Point. Consistent with that Point are both the Parts of this Case; namely, the Two Questions, whether there was Malice, and whether there was probable Cause in this Case; if we were to admit that there was probable Cause for preferring this Accusation, I think no Man will urge that there was sufficient Evidence of Malice; the Charge of Malice takes for its main Group

Ground that there was no probable Cause for Prosecution; for if there really was a probable Cause for Prosecution, it would be vastly too much to say, that because it happened that this Transaction arose at a great Distance from this Country, and consequently that an Arrest, and the Intention of bringing the Party to a Court Martial, was unavoidably attended with great personal Inconvenience to the Party arrested, that that alone can be a Foundation from whence Malice shall be imputed, or that the Case shall be different from what it would have been, had the Transaction happened in *Torbay*, and the Party had been arrested and brought to his Trial within Twenty-four Hours after the Thing happened. It was an unfortunate Circumstance, not sufficiently to be regretted, that such a Transaction should happen at such a Distance, where there being probable Cause to arrest this Gentleman, and put him upon his Trial, and where Reasons of high Probability, at least, may be suggested, why it was not fit to bring him to that Trial during the Time they remained in that Port, or in the Passage to *Saldanha Bay*, or after in *Saldanha Bay*, where I take it the Separation was, it should be unfortunately attended with great Inconvenience to him; but there is no Foundation to infer Malice, in the Prosecution arising from that Circumstance of Distress, which the Arrest in that Situation must necessarily produce; for indeed if we consider how far that goes, and how extremely diabolical the Heart of that Man must be, who would mean to put an inferior Officer, acting under him, under an Arrest for the Purpose, and with a View of making it so distressing as this turned out to be; I think no Man ought to believe that of another, without there was strong and urgent Evidence, which should make it impossible for him to resist the Belief. I discover no Evidence of that Sort in this Cause; and I trust that there are no Naval Officers to whom any Thing so wicked could, with any Foundation of Probability, be imputed; I won't say, that if it was clear that there was no Sort of Foundation for this Charge, that that being established, that the Circumstance of the Charge, so unfounded, being made in such a Situation, where it must necessarily produce such terrible Consequences to the Party upon whom that was made, and where it must involve him in such Loss, such Expence; where it must be so long, of Necessity, before it could come to a Decision; I don't say that they would not be Circumstances, taking their original Foundations in the Thing itself being totally unfounded, which would not warrant an Imputation of Malice, in the Manner of making that unfounded Charge, both as to Time and Place; but that is not the Case upon this Evidence; and I am very glad that I can ground the Opinion that I have upon the Case, upon that Part of it, upon Facts that are admitted in the Cause, that stand clear of all technical Language, and upon which there is not the least Contradiction. I cannot help observing, that when we are discussing the Question, whether or not there was probable Cause for the Accusation which Commodore *Johnstone* made against Captain *Sutton*? the Mode of discussing it has really been, in Effect, trying that Question over again; and a very solemn Trial there has been of it, and a vast Quantity of Evidence adduced, and so much Evidence adduced, as, if the Court were competent to try it, and this were the Moment when it were to be tried, might exceedingly puzzle the Court how to decide. But this Fact is most clear, that positive Orders were given to Captain *Sutton* to cut or slip. It is most clear that it was the Duty of Cap-
tain

tain *Sutton*, under that Order, to be the first to cut or slip, his Situation called upon him to do so; so they all agree. It is most clear, that he was the last; so that the Disobedience of that positive Order stands clear of all Questions, and is agreed to on all Sides; and it was necessary for Captain *Sutton*, at the Court Martial, so the Terms of the Sentence import, it was necessary for Captain *Sutton* to go into the Evidence, to raise upon that Evidence Ground of Justification, which, admitting the Fact of the Disobedience, might be a Reason why that Disobedience, in that particular Case, should not be wilful, a great deal of important Evidence has been offered by Captain *Sutton* upon this Point, perhaps the Weight of the Evidence inclines that way. I am far from imputing any Blame; it would be presumptuous in me to do it upon those who have decided, having the Jurisdiction to do so, upon that Evidence that he stood justified; but if it was necessary that Captain *Sutton* should show that Justification, and if that Justification was to turn upon the Number and the Weight of the Testimony, upon the Result of great contradictory Evidence, with respect to it, is it possible to say that the Commodore, whose Business was not to decide, but whose Business was only to accuse, and to bring the Case to the competent Jurisdiction for Decision, that he had not a probable Cause for preferring that Accusation? What had he to do more, when he brought his Accusation forward, but to say, here is the Proof of my Order to cut or slip? Here is the Proof that you was to cut or slip immediately, the first of the Squadron; it appears in fact that you cut or slipped the last; I will go no further. Would it not have been incumbent upon Captain *Sutton* to have then taken up the Defence; and to have urged in his Defence, that it was very true he had disobeyed Orders; but it was under such Circumstances, the whole of it taken into Consideration, as may, consistent with the Discipline of the Navy, amount to a Justification, or to an Excuse, or it might be within the Rules of the Navy criminal, and yet, in respect of some Circumstance that happened to arise from it, meritorious; so that though he might be reprimanded, or perhaps be obliged to ask for a Pardon, would possibly be intitled to a Reward immediately afterwards, and yet the Nature of the Defence would remain entirely the same; and therefore to say, that where the Fact of Disobedience stands clear of all Question in point of Fact, and where it all turns upon the Justification, and upon that a great Variety of Evidence, to say there was no probable Cause for the Accusation, is carrying the Idea of probable Cause to a Length that to me is perfectly incomprehensible; there never, in my Mind, was any Thing clearer, than that the probable Cause, in this Case, was fully and satisfactorily made out; not upon the contradictory Evidence; laying all that out of the Case, taking which Side you will, admit the Whole of the Evidence on the Part of the Plaintiff in this Cause ought to be believed, and the other Evidence, except as to the actual Disobedience in point of Fact, all disbelieved; yet it being the Defendant's Evidence; and it being Evidence which could not be the whole of it within the Knowledge of the Commodore at the Time he preferred his Accusation, he was not bound to know it, nor to enter into it; he had good Reason for preferring his Accusation. Captain *Sutton* has been heard upon it, and has been acquitted; I rejoice at it: But let it not be concluded that it is a necessary Consequence, that a Commander in Chief, who is bound to exercise his Judgment upon

the Conduct of his inferior Officer's having the Discipline of the Navy to maintain, is of course to be prosecuted civilly, and with a View to pecuniary Damages; because, in exercising his Judgment, it has unfortunately occurred, that it became necessary for him to accuse under Circumstances, which produced great Hardships to Mr. *Sutton*, upon a Case which required Explanation, and which Explanation could not with Convenience be had, but under such Circumstances as turned out to be very injurious to Mr. *Sutton*. I cannot think that the Discipline of the Navy, and the Good of that important Service to this Country, ought to rest upon such Transactions as these are. I am not sorry that my Opinion upon this Point leads me to concur in Opinion that there ought to be a new Trial, because I own I feel very averse to the sustaining this Verdict, which has entirely proceeded by the Rashness, I will call it, of the Defendant in this Cause, in pressing forward a Kind of Examination which he ought to have resisted. I say, when the Cause has proceeded upon Grounds perfectly collateral, in my Apprehension, to the true Merits of it; Grounds of a Nature extremely likely to irritate, and to carry Men from the cool Consideration of the true Question, upon Grounds upon which all our Politicians in this Country, those who understand the Subject, and those who do not, have been extremely divided; and Grounds which, till they are properly decided by proper Authority, I suppose will ever remain Matter of great Discussion, upon which you will not easily find any Two Men who are not Seamen—Seamen, I dare say, understand it; but any Two Men who are not Seamen, who will not have a very positive and a very ignorant Opinion of it one Way or other; and how it is possible this Defendant could think of taking upon himself such a Point of Delicacy as this was, against the good Sense of his Counsel, and pressing it on in the Manner in which I understand it was pressed, is to me incomprehensible. I conceive he will be wiser another Time. I confess I should have been very sorry if the Cause had stood upon Evidence of such a Nature, which had no Connection with the Cause; there was an Attempt to connect it; but that was done by conjecturing that the Motive might be to conceal a Misconduct of Commodore *Johnstone's* own; and having laid that as a Foundation, giving that Evidence of a Misconduct in order to connect it, it would have been necessary to shew, in point of Fact, that it was his Motive; that he had charged Captain *Sutton*, in order to draw off the Attention of the publick Eye from himself to Captain *Sutton*. Some Evidence of that should have been offered, and then the Nature of that Misconduct would have been a Subject of collateral Enquiry, introduced into a Cause with which it had no Connection. There was no one Fact in the World, that could have been stated in the Conduct of Commodore *Johnstone*, in any Part of his Life, that might not as well have been brought into this Cause, as that Business, *viz.* Whether Mr. *Johnstone* was or not justified in the Conduct that he held when he came into this Harbour, and made the Disposition that it appears in Evidence that he made. There seems to me to remain but one other Subject; namely, the Circumstance of Commodore *Johnstone's* having offered Evidence, which turned out to be Evidence which the Jury gave no Credit to, with respect to a Fact of Captain *Sutton's* having cut his Cable in the Morning, upon the *French* Fleet entering the Port: And it seems to me, that those, who are on the Side of Captain *Sutton*, have been as jealous for him, and been as eager to draw that Fact from

from the true Application of it, to a Subject to which it was not meant to apply; as on the other Side, they were eager to draw the whole Subject from the proper Train it ought to have been in; for that by no means went to affix any Imputation upon Captain *Sutton* of the Kind alluded to. In the first place, it did not appear that it was under any Order from Captain *Sutton*: The Tendency of it rather was, if the Thing was true, upon an Alarm being given, by a Kind of sudden Impulse of the Crew, there being Reason to apprehend that a very superior Force was coming upon them, which, in their Situation, they would be unable to resist; they were to cut, in order to take their Opportunity of getting to Sea, in order to take the Opportunity of getting off. I am not Judge enough of the Subject to know, whether, before the Event had been decided, it would have been, the most prudent Step for all these Ships to have taken, or not. It depended a little, I should imagine, upon how Monsieur *Suffrein* sustained the Conflict he thought fit to enter into. Had that Action been sustained in the Way in which I believe an *English* Squadron would have sustained it, I don't know whether such a Measure, for getting off as soon as possible, would not have been a wise Measure; and that is a Question merely hypothetical: And as to the Point of imputing Blame to Captain *Sutton*, it failed, and it had a direct Reference to another Subject; namely, as to the Case Commodore *Johnstone* had to sustain, and to which he had an undoubted Right to call his Witnesses; for it being attempted to clear up a Part of the Delay, by accounting for Ten Minutes Delay by the Cable having been cut inside, and getting into that Situation he described; if he could establish the Point that the Cable was cut in the Morning, to be sure he threw upon Captain *Sutton* the Difficulty of Ten Minutes more, which his Evidence did not go to; and therefore it was directly in point to his Disobedience of Orders. I don't know whether I did not omit, in considering the Accusation, to take Notice of the second Part of it, which was his not continuing in the Line at Sun-set; there is more Difficulty in that, had it stood alone. I should have had more Difficulty about that; I should be obliged to examine with more Particularity than I wish to do, the Evidence relating to it; but thus much I collect from the Evidence of Captain *Alms*, that a Signal was out at Sun set for the *Isis*, not being in her Station; he afterwards said, about Sun-set she did come into her Station; that is bringing it to a pretty nice Point; and though it may be, upon so nice a Point, a proper Subject for Acquittal, it by no means follows, that a Ship under the Circumstances this Ship was described to be in, where there had been a Disobedience of Orders, in not coming out so soon as was expected; and upon coming out, her Mainsail not set, it will be too much, to say even with respect to that, that there was not a probable Cause for the Accusation, how much soever it might turn out that he was justified in it. I am extremely satisfied, upon the whole, that if the Defendant asks upon this Verdict to set it aside, it must be set aside.

Mr. Baron H O T H A M.

AS the Day is far spent, and as my Opinion coincides with my Lord Chief Baron, and my Brother *Eyre*, of course there must be a new Trial. That being the Case, I shall purposely avoid going into any Observations upon the Evidence that has been given, because, as it is to go to another Trial, it is fit it should go with as little Prejudice as possible; but I shall content myself with stating, in a very few Words, the Reasons for my coinciding in this Opinion. In the first place, It is impossible to controvert this, that there has been, no Matter by what Cause, there has been a vast Variety of Matter mixed in this Cause, that ought not to have been introduced into it. I am not at all surprised that my Lord Chief Baron suffered it to be given, because, when he saw a Gentleman, the Defendant, begging and praying that this Evidence might be gone into on the one Side, and the Plaintiff's Counsel as solicitous on the other, that it should, it was a Matter of great Difficulty and Delicacy for him to have interposed and prevented it, and therefore I don't wonder that he suffered it to be given; but, unquestionably, all that related to Commodore *Johnstone's* Conduct at *Port Praya*, had, as my Brother *Eyre* has just said, nothing to do with the Cause; but though it had nothing to do with it, it is absolutely impossible that the Jury should have attended to it, without mixing it in some Degree with the Opinions which they were to form upon the Whole of what they heard; that I think, therefore, is one Ground why one should wish that the Matter goes back to another Trial, that it might go to the Jury pure, simple, and unmixed, without any Sort of extraneous Matter of this Kind; the single Question then before the Jury was, Whether or no upon the Whole of the Case there appeared in Commodore *Johnstone's* Conduct towards Captain *Sutton*, that Degree of Malice which ought to make him answer in this Action for it. Now, with respect to that, if Commodore *Johnstone* could shew that there was probable Cause for his bringing Captain *Sutton* to a Court Martial, it does in my Apprehension exclude the Presumption and Idea of Malice: It is said there was no such probable Cause; there could be no such probable Cause, for Captain *Sutton* was brought to a Court Martial, and after the Charge was investigated, he was acquitted by that Court. We all rejoice in his Acquittal; I should hope Commodore *Johnstone* himself does; but it by no means follows, that because he was acquitted of the Charge, that therefore Commodore *Johnstone* was not well justified in bringing him to Trial; and it would be a most serious Thing indeed to all Commanders in Chief, if, before they ventured to exercise what is an absolute and indispensable Part of their Duty; namely, to bring the Officers under their Command to Justice, if in their Opinion they disobey the Orders that are given; it would be a very cruel Situation indeed for them to stand in, if before they venture to enter upon that necessary Part of their Duty, they were to be sure of the Sentence of a Court Martial; it is impossible they ever should be sure of that Sentence; they cannot foresee what Credit may be given to the Witnesses; what Turn the Trial may take; and therefore it must always be a Matter of Hazard and Risque to them: That
being

being so upon this Evidence, without going into the Evidence at large, was there or was there not any Thing that did afford a probable Cause of Suspicion to Commodore *Johnstone*? In my Opinion there certainly was; he gave a positive explicit Order in his own Person; that Order he frequently repeated by Signal; he saw that Order for a considerable Length of Time, though as to the precise Time the Witnesses differ very much, but they all agree that for some Time he saw that Order disobeyed; that therefore was, *prima facie*, a sufficient Cause for him to call upon Captain *Sutton* to say, you must prove before a Court Martial why this Delay was occasioned; you must give some Account of it: Well, but it is said if Commodore *Johnstone* had given himself the Trouble to enquire of the Officers on board of the *Isis*, he would then have received the Satisfaction that the World has received. For he would have found upon that Enquiry, that Captain *Sutton* had really and truly not been guilty of a Misconduct. Now, with respect to that, it might have been humane, it might have been candid, it might have been kind; but I do not know that Commodore *Johnstone*, as the Commander in Chief, was bound to ask any Officer under his Command for such Explanation, the Fact fell within his own direct Knowledge, he saw it with his own Eyes: He did go on board Captain *Sutton* the next Day, and asked him to explain it. *Sutton* gave him a List of the Damages he had received: Commodore *Johnstone* had exercised his Judgment upon that before, he continued to have the same Opinion of it then. If this is all you have to say, it is not enough; I must bring you to Trial. It would be exceedingly dangerous if Commodore *Johnstone*, or any Commander in Chief, was to talk to the Officers of the Fleet upon the Subject, because he could not talk to them in the Way that they ought to be talked to when they came to give their Evidence upon the Court Martial; it would be (as was said by one of the Counsel) highly indelicate for any Commander to enter into that Discussion; it would be trying Captain *Sutton* at the Moment that he ought not to do so; but supposing he had done this, and that he had taken the Trouble to ask all the Officers, and to examine every Witness who has been examined in this Cause as to the Conduct of Captain *Sutton*; and supposing they had done what we suppose they must have done, have given Commodore *Johnstone* exactly the same Account they have given now, what must have been the Consequence? Commodore *Johnstone* must have felt himself in a Dilemma: He must have said, "I stand here with contradictory Evidence; some Officers say one Thing, other Officers say another, what am I to do; I cannot decide between them; a Court Martial must decide; and therefore, if he had had all the Light he has now, it seems to me that the Contradiction which he would have heard in the Account the Evidences have given, would have amounted to that probable Cause of Suspicion in his Mind that would have justified him in bringing Captain *Sutton* to Trial. With respect to the Malice; express Malice, unquestionably, there has not been proved; Circumstances of Malice have been laid before the Jury: How far they amount to convict the Commodore of so very base a Purpose as that, is for the Jury to decide; that we have nothing to do with; but, however, it does appear so far, from all the Evidence that has been laid before us, that very little more, if any Thing, has happened in this Case than what happens from the Event of every Court Martial; no previous Hardship, no Acrimony of Behaviour, nothing in Words, in Looks, in Action,

nothing that passed between the Commodore and Captain *Sutton*, that can import any previous Malice. As far as Letters shew the Conduct of Commodore *Johnstone* afterwards, there does not seem to be any Want of Accommodation to Captain *Sutton* after the Thing had happened; but to be sure, so far he was put to great Inconvenience, he was subject to the Peril and Disgrace of a Court Martial, and he was acquitted; that happens to every Man who has the same Fate.

These Grounds, I think, are sufficient to induce the Court to grant a new Trial; but, exclusive of these Grounds, I think that there are other Parts of this Case that may justify the Court in wishing that it may be reconsidered. The very Novelty of the Question, the Question itself, so new to every Body who has heard it discussed, the Importance of it so vast to the Service, it is of the utmost Consequence that every Commander in Chief in the Navy should know precisely and particularly how this is to stand in future. Are they to be called in question whenever an Officer happens to be acquitted that they have brought to Trial? or, must positive and direct Malice be proved against them? When they know that, and it is fit they should know it, then they will know how to act. In this State of it, I own, for my own Part, without meaning to disparage the Conduct of any Gentleman upon the Jury, I have not heard the Name of any one of them; but it does not seem unnatural to suppose, that in a Question of this Kind, complicated with a vast Variety of Circumstances, of which, to be sure, they were not very cognizant, it is not at all unlikely to suppose, that they had not, during so very long a Trial, kept in their Minds the precise Point of the Question, though none of us, Nobody in the Kingdom but knows, that they received every possible Information and Instruction from my Lord Chief Baron who tried the Cause; yet, when we hear that it lasted from Ten o'Clock in the Morning till Eight the next Morning; when we find that there was a considerable Degree of Impatience in the Jury to have the Cause brought to a Conclusion, one does not wonder that perhaps they were not, during so very long a Discussion as this, constantly attending to the Point; and I own, I make no Difficulty in saying, I rather think they had not continually kept the true Point before them, for if there was no Malice in Commodore *Johnstone*, if he had a probable Cause, whatever has been the Event, of the Acquittal of Captain *Sutton*, it should not affect him; but, if there was a probable Cause for his seeing these Things at the Moment with this suspicious Eye, and there was no Malice in the Commodore in bringing him to Trial, but he brought him to Trial under a Sense of the Duty he thought he owed to the Public and the Service, they ought to have found a Verdict for him. But they were of a different Opinion; and if they took it into their Consideration, that from all the Circumstances of the Case, Malice might have been the Motive which actuated the Commodore, I don't know but that, if that was their Sentiment, the Verdict might have been different. Five thousand Pounds they might not think too much to give to a Gentleman who had been injured by the Conduct of his Commanding Officer acting under so very improper a Motive as that; and therefore it seems to me, that it is not absolutely impossible that the Jury might, in this vast Variety of Circumstances, perhaps, have not been satisfied about the Malice, but that they may have thought Captain *Sutton* has been brought into a very dreadful Dilemma, he has suffered most exceedingly, and ought to have some Reparation, and therefore we will give him this in Damages. Something

thing of this Sort, I think, may have been the Case, from the Nature of the Verdict; if the Damages had been a great Deal more, it would have decided the Opinion I should have entertained upon the Ground on which they went; I should have thought, at once, it must be upon the Ground of Malice entertained in the Commodore. The Verdict being as it is, I think it is very likely it may have been mixt up with Matter that did not belong to it at all. The simple Question for them to decide was, Was there Malice in the Commodore? If there was, the Verdict, as far as it went, was proper. If there was no Malice, but probable Cause, then the Commodore ought to have had a Verdict. And I think it is fit this should once more be considered, that they may have an Opportunity of considering the Matter under the Directions they will receive, and for their own Sake, for Commodore *Johnstone's* Sake, for Captain *Sutton's* Sake, and for the Sake of the Service of the Country, this should be known to be the decided Opinion of a Jury upon full and fair Information, and that there should be no possible Doubt left in the Minds of the Subject, upon which Side this Question ought to be determined.

Mr. Baron P E R R Y N.

I HAVE given this Cause the clearest Consideration in my Power; and during great Part of the Argument, my Opinion inclined, that this Cause had been fully before a Jury; that there was Evidence on both Sides, and that it was a proper Cause for their Decision; but am now satisfied, that this Cause has not yet been decided upon its true Merits. In order to ground this Action, there must have been Malice, and a Want of a probable Cause. I entirely concur with what Mr. *Dallas* said at the Close of his Argument, *That if all the Evidence that was laid before the Jury in this Cause had been laid before Commodore Johnstone at the Time he put Captain Sutton under an Arrest, exclusive of the Sentence of the Court Martial, I should have been of Opinion it was a probable Cause for an Arrest: That is my Idea.*—Upon the first Outset of this Business, a great Deal of Evidence has been received that ought not, in my Judgment, to have been admitted at the Trial: That was received under my Lord Chief Baron under such Circumstances, that it was not likely he could resist; therefore, without taking up any more Time, at this late Hour, or entering minutely into the several Circumstances of this Case, my Opinion is, That the Cause has not been decided upon its true Merits, and therefore it ought to go to a new Trial.

In the Exchequer. { EVELYN SUTTON, Esq;
VERSUS
GEORGE JOHNSTONE, Esq;

T H E

SPEECH of Mr. Baron EYRE,

On giving Judgement in this Cause.

JUNE 15, 1785.

Mr. Baron EYRE.

IN this Case of *Sutton* versus *Johnstone*, it has been moved to arrest the Judgement, upon Objections taken to the First and Third Counts in the Declaration.

It is an Action on the Case brought by the Plaintiff, Captain of the *Isis* Ship of War, one of the Squadron under the Command of the Defendant. And the first Count imputes to the Defendant, the having maliciously, and without probable Cause, charged the Plaintiff with the Crimes of Disobedience of Orders, and the Delay of the public Service in which that Squadron was engaged; and upon that Charge, having put him under Arrest, suspended him from his Command, sent him under Arrest to the *East Indies*, and from thence to *Great Britain*, in order to be tried; and with having maliciously, and without probable Cause, kept him under Arrest till his Trial, and having procured him to be tried by a Court Martial, upon a false, malicious, and injurious Charge.

This being the Ground of the Action, expressed in the First Count of the Declaration; it is objected, in Arrest of Judgement, that no Action for a malicious Prosecution will lie for a subordinate Officer against his superior Officer for improper Conduct while under his Command; or, as put by one of the Counsel, no Action lies for a subordinate Officer against his superior Officer, for an Act done in the Course of Discipline, and under Powers incident to his Situation.

C

These

These Propositions have been supported by Arguments drawn from the Analogy the Case is supposed to bear to the Case of Judges, Jurors, and the Attorney General, in respect of his Power to file Informations *ex officio*, and from general Principles of public Policy and Convenience; and they have been rested upon those Grounds, there being no adjudged Case or other Authority in our Law, that can be made to bear upon the Point, so as to give it any Support; on the contrary, it was necessary to press into the Service Distinctions and Refinements, in order to take the Case out of the Class of adjudged Cases bearing very strongly the other Way. The Cases I allude to are the Cases of *Webb v. M'Namara*, *Fabrigas v. Mostyn*, *Sutherland v. Murray*; which being Cases in which one Species of Action is supported against Military Men in Command, in one Instance, by a subordinate Officer; in others, by Persons subject to the Powers incident to the Situation of those military Men in Command, for Acts done by Colour of their Authority; or, in the Language of one of the Propositions, under those Powers incident to their Situation; it does not readily occur why another Species of Action, differing from those in Form rather than in Substance, should not also be sustained. These Cases certainly cut up all Arguments drawn from public Policy and Convenience; because public Policy and Convenience, if they operate at all, must operate with Strength sufficient to bar one Species of Action as much as another.

The Court never had a Difficulty upon this Part of the Case; the Principle of the Action, which is pretty clearly ascertained in the Two Cases of *Saville v. Roberts*, and the Case, *Jones v. Gwynn*, *Gilbert's Reports*, 185. and in 10th Modern 148, and the Principle of the Action, which is very clearly ascertained in those two Cases, is general and universal. In the Cases alluded to, of Judges and Jurors, it cannot apply, because the Law gives Faith and Credence to what they do, and therefore there must always, in what they do, be Cause for what they do; and there never can be any Malice in what they do. The Presumption of Law, that Judges and Jurors do nothing causelessly and maliciously, does not derogate from the Universality of the Principle, "That where it can be shewn that one Man has causelessly and maliciously accused another of a Crime, or has otherwise vexed him, by causelessly and maliciously exercising upon him, to his Damage, Powers incident to his Situation of Superior, the injured Party is intitled to Redress by this Species of Action." The Commander in Chief of a Squadron of Ships of War is in the Condition of every other Subject of this Country, who, being put in Authority, has Responsibility annexed to his Situation.

The Propositions which attempt to establish a Distinction for him, are dangerously loose and indefinite. It is said, subordinate Officers may be brought to a Court Martial for improper Conduct. If by improper Conduct is meant a Breach of the Articles for the Government of the Navy; if by a Course of Discipline is meant, exacting that which the Discipline of the Navy requires; if by what is done under Powers is meant, that which is warranted to be done under those Powers; it will be agreed simply, for doing any of those Acts no Action will lie; for those are lawful Acts in themselves, and there is nothing added to make them unlawful, in the particular Case; but in respect of the first
Branch

Branch of this Proposition, if it is meant that a Commander-in Chief has a Privilege to bring a subordinate Officer to a Court Martial for an Offence which he knows him to be innocent of, under Colour of his Power, or of the Duty of his Situation, to bring forward Inquiries into the Conduct of his Officers, the Proposition is too monstrous to be debated.

Under the Second Branch of it, it may not be fit, in point of Discipline, that a subordinate Officer should dispute the Commands of his Superior, if he were ordered to go to the Mast-head, and if the Superior were to order him thither, knowing that, from some bodily Infirmary, it was impossible he should execute the Order, and that he must infallibly break his Neck in the Attempt: And if it were so to happen, the Discipline of the Navy would not protect that Superior from being guilty of the Crime of Murder. And one may observe in general, in respect to what is done under Powers incident to Situations, that there is a wide Difference between indulging to Situation a Latitude touching the Extent of Power, and touching the Abuse of it. Cases may be put of Situations so critical, that the Power ought to be unbounded; but it is impossible to state a Case where it is necessary that it should be abused; and it is the Felicity of those who live under a free Constitution of Government, that it is equally impossible to state a Case where it can be abused with Impunity. The Counsel for the Defendant were disposed to agree to this general Doctrine, provided that the Question was not to be discussed in an Action at Law, which unavoidably brings the Inquiry into a Matter of Fact before a Jury: We entered into all the Difficulties; the Situation of an Officer whose Honour and Fortune may come to be so staked.—In this particular Case they have had their Weight with us; the Decision has not been a hasty one; but Considerations of this Nature cannot exclude the established Jurisdiction of the Country; on the contrary, those Jurisdictions must be presumed to be equal to their Functions, it must be presumed that they will do their Duty honestly; if they do, no Man can have much to fear. To Situations which require Indulgence, they will shew it; but, be the Risque more or less, all Men hold their Situations in this Country upon the Terms of submitting to have their Conduct examined and measured by that Standard which the Law has established. Men of Honour will do their Duty and will abide the Consequences. We decide against this first Objection, upon the mere abstract State of it, without referring to the particular Case made upon this Record, which is certainly the most advantageous Way of considering it for the Defendant; for undoubtedly upon this Record, which must now be taken to be proved, there is a strong Case stated, of Hardship, if not of Wrong, Injustice, and Violence. Before I leave this Head of Objection, I will observe upon an Order of the Justices of Gaol Delivery, which is printed at the End of *Keeling's Reports*, from whence it was inferred, that the Court have thought themselves at Liberty to controul this Species of Action; that the Nature of that Controul, which was the withholding the Evidence, rather proves that the Action itself was thought to be beyond the Reach of any Controul; in Truth, it seems to be nothing more than substituting a particular Licence to give Copies upon Motion, to the general Licence which the Officer of the Court had been permitted to assume, both

founded upon the absolute Power of the Court, over the Records of their Proceedings for Felony, while they remained in their Custody. The Object of this Order, and of many of the Expressions, we meet with in our Books, tending to discourage this Species of Action, could not be to protect any particular Class of Cases from being made the Subject of the Action; but were to prevent a frivolous and vexatious Action of this Species being brought in any Case, that must always turn upon the particular Merits of each particular Case.

The next Objection taken to this Count was, that this being an Action founded on the Want of probable Cause, the Action fails; because upon the Face of the Record, and upon the Plaintiff's own shewing there was probable Cause, it is upon the Face of the Sentence of the Court Martial, that the probable Cause is said to appear; Part of the Charge being for Disobedience of Orders, in not slipping the Cable of the *Iss* immediately after the Plaintiff got on board; the Language of the Sentence is, that from the Circumstances proved of the Condition the *Iss* was in, it appeared to the Court Martial, that the Plaintiff was justifiable, in not immediately cutting or slipping the Cable after his getting on board; from whence it was collected that it appears that the Plaintiff did disobey the Orders of the Defendant, and that he was driven to justify himself by Circumstances, and that his Acquittal proceeded not upon the Ground of his not having disobeyed but on the Ground of his Justification. Upon this Part of the Case there has been some Hesitation amongst us; a Case not cited in the Argument at the Bar, as I recollect; but which occurred in the Searches that have been made, gave considerable Countenance to the Objection. The Case I refer to is the Case of *Reynolds v. Kenney* reported in 1st *Wilson*: It was a Case in Error from the *King's Bench* in *Ireland*; an Action was brought for maliciously, and without probable Cause, prosecuting for Condemnation Brandy seized as forfeited; the Declaration states, that the Brandy was condemned by the Sub-commissioners, and that that Condemnation was most rightfully reversed on Appeal to the Commissioners. The Judgement was arrested in the Court of *King's Bench* in *Ireland*, and that Judgement affirmed here; and it was said by Lord Chief Justice *Lee*, the Plaintiff has, by his own Declaration, shewn that the Prosecution was not malicious, because the Sub-commissioners gave Judgement for him; and therefore we cannot infer any Malice: Perhaps it would have been more correctly stated, if they had said, and therefore we will infer that there was probable Cause for prosecuting that Brandy to Condemnation. To my Apprehension, I confess the Fact of the Orders having been disobeyed, seems fairly to be collected from the Sentence, which takes upon itself to justify the not obeying, and to make that the Ground of the Acquittal. If the State and Condition of a Ship is such, that an Order given cannot be obeyed, the not obeying in that Case is not Disobedience, and requires no Justification; but there ought to be an Acquittal upon the Ground of the Charge of Disobedience not being made out. If a subordinate Officer having received an Order which might be obeyed, does not obey, because Regard being had to the State and Condition of his Ship, he is of Opinion that such an Order ought not to have been issued to him, in this Case, the not obeying is Disobedience, in my Apprehension, and he would be to justify himself as he could. The Sentence
not

not being examinable here, I am relieved from the Difficulty of comprehending what Circumstances can amount to a Justification of a subordinate Officer in disobeying the Order of his Superior. We are bound by the Sentence to understand, that somehow or other the Plaintiff, in this Case, does stand justified; but the Question is, whether we are not also bound to conclude from this Sentence, that he did in fact disobey; and whether that be not probable Cause for bringing him to a Court Martial, there to justify himself for that Disobedience? Doubtless a Court Martial is not bound to express itself in strict technical Language; and this Court-Martial may have used, in this Case, the Word *justifiable*, in some Sense different from our Notion of Justification; but having acquitted the Plaintiff generally of the Charge of delaying the Public Service, which was one of the Two specific Charges brought against him, and having made this special Acquittal upon the Charge of Disobedience of Orders, it does seem as if they meant to say, that he did not delay the Public Service, but that he did disobey the Order, and for some Reason satisfactory to them, was justified in that Disobedience. If this be the true Meaning of the Sentence, will not the Fact of Disobedience thus established, be a probable Cause for bringing him to a Court-Martial? If the Defendant is, upon this Declaration, to be taken to be ignorant; or if he is not averred to be cognizant of all the Circumstances which constituted the Justification, I should, in that Case, hold most clearly that it would be probable Cause. Reasonable Suspicion, was probable Cause, in the ancient Proceedings in Conspiracy; this would be more, for the *corpus delicti* in this Case stands confessed. It is averred against the Defender in this Declaration, that he knew the Ship had received Damage, that he knew that the Plaintiff obeyed his Orders as far as the State and Condition of his Ship would permit; but it is not averred that he knew the Circumstances of the State and Condition of the Ship which were proved to the Court-Martial, upon which the Justification is built. This undoubtedly is rather critical; but what if the Defendant were taken to be cognizant of all the Circumstances of the State and Condition of the Ship proved to the Court-Martial, did he know, or was he bound to know, that they would amount to a Justification in the Judgment of the Court-Martial? In our Law, Justification is a Conclusion of Law which necessarily results from a given State of Fact, and yet I doubt extremely, whether if a Man were to indict one for Murder who had committed a Homicide, under Circumstances within the Knowledge of the Prosecutor which made it justifiable, it could be said that there was no probable Cause for preferring that Indictment; but I am not sure that Justification in the Law Martial is a Matter of equal Certainty in its Nature, so as to impute to the Defendant a Knowledge that he was prosecuting in a Case where, of Necessity, there must an Acquittal upon the Ground of Justification. These are Questions of considerable Moment and Difficulty, upon which I have already said we have hesitated; and we shall not now give an Opinion upon them, because, upon farther Consideration, we are of Opinion, that admitting, for the Sake of the Argument, that probable Cause did appear upon this Record for making a Charge of Disobedience of Orders, it cannot operate to arrest this Judgment. The Defendant is charged by this Court in the Declaration, with having maliciously, and without probable Cause, brought the Plaintiff to a Court-Martial upon one intire Charge, but consisting of Two distinct Articles; those Two
distinct

distinct Articles fall upon Two Articles for the Government of the Navy : The First, for delaying the Public Service ; the Second, for Disobedience of Orders. I have observed, that the Sentence of the Court-martial acquits him generally of the First. They say he did not delay the Service. It is impossible therefore to find in the Sentence probable Cause for this Part of the Charge ; then it will stand thus, The Plaintiff charges the Defendant with having maliciously, and without probable Cause, brought the Plaintiff to a Court-Martial upon One Charge for which there was no probable Cause, and upon another Charge for which there was probable Cause ; the Declaration is therefore *felo de se* with respect to the latter, but good as to the former. In that Case, after a Verdict, the Jury must be taken to have given Damages for that Part of the Case only which is actionable. This is familiar in the Cause of the Action for Words. The Words in one Count may consist of several distinct Paragraphs or Periods, some actionable, some not. It is no Objection, after a Verdict, that some of the Words given in Evidence, and charged in that Count, are not actionable ; if there are actionable Words to which the Damages can be applied, the Jury are presumed to have given their Damage for the Words which are actionable, it is enough to sustain a Judgement upon this Count, that a Cause of Action appears in it ; that which does not amount to a Cause of Action, is mere Surplusage.

It is farther objected to this Count, that the Assignment of the special Damages is ill laid. The Count states, that the Plaintiff lost a large Sum of Money, which he would have gained if he had not been suspended and removed from his Rank and Post of Captain of the *Isis*, from Prizes taken by the *Isis* and the other Ships of the Squadron, in the Course of the Service, and during his Arrest and Suspension. It is objected, that there is no Averment or Allegation of Title to Prize Money ; that it does not follow from the Fact stated, that the Prize Money was lost ; that by Law the Prize Money was not lost, and that the Jury have therefore found Damages which by Law could not be found. We are clearly of Opinion, that this Objection must be over-ruled. The Damages are well assigned by stating, that the Loss happened by reason of the Wrong complained of ; the rest is Matter of Evidence ; and if any Thing which can now be suggested would have proved the Loss to have happened by that Means ; after Verdict, we must suppose that Proof to have been given ; the Objection therefore resolves itself into the last Branch of it, *viz.* That the Jury have found Damages which could not possibly arise in the Case, and could not therefore by Law be found. To support which Proposition it has been argued, that a suspended Captain is intitled to the Prize Money for Captures made during the Time of his Suspension. The Proclamation must be the Rule by which this Point is to be decided. By the Proclamation, the Captain of a King's Ship who shall be actually on board at the taking of any Prize, shall have a certain Proportion. Is one who had been suspended, and removed from his Rank and Post of Captain, and was in that State of Suspension when the Prize was taken, the Captain of such Ship actually on board at the taking of such Prize ? it is enough to state the Question, it answers itself. Not having original Jurisdiction in Matter of Prize, we cannot decide that Question so as to affect the Right of Prize

Prize Money, but we are obliged to decide it as far as it is incidental Matter in this Cause, and for the Purpose of this Cause; and premising this, we hold in this Cause, that the Plaintiff, by reason of his Suspension and Removal, did lose the Prize Money which he would have gained from Prizes taken by the *Issis* and other Ships during his Suspension, and consequently that this is well assigned as special Damage in this Action.

It is objected to the Third Count of this Declaration, the Grievance of which is the refusing and neglecting to hold a Court-Martial for the Trial of the Plaintiff while the Squadron was under the Defendant's Command, and thereby keeping him under Arrest till his Trial in *Great Britain*; that this is *damnum sine injuria*; that the Law has fixed no Time short of the Term of Three Years within which Courts Martial are to be held; and therefore it could not be the Duty of the Commander to hold a Court-Martial at any Time within that Period, or as soon as he reasonably and conveniently could after the Charge exhibited, and consequently that the Averments, that it was the Duty of the Defendant to hold such Court-Martial; that the Defendant might reasonably and conveniently have held a Court-Martial; and that he wilfully, wrongfully and injuriously, and contrary to his Duty, omitted, neglected, and refused to hold such Court-Martial, cannot give to the Plaintiff a Cause of Action. The Answer to this Objection is, that every Breach of a public Duty working Wrong and Loss to another, is an Injury, and actionable; that the Three Years are only a Limitation of Time, beyond which no Court-Martial shall be held; consistent with which it may be the Duty of those who have Power to hold Courts Martial, to hold them within a much shorter Space. It is a familiar Qualification of Powers of various Kinds, that they should be executed within a reasonable Time. Suspension and Arrest being incident to the Power of holding a Court-Martial, it seems an essential Ingredient in such a Power, and absolutely necessary to qualify the Rigour of it, that it should be executed in a reasonable Time, otherwise a Power of holding a Court Martial would necessarily involve in it a Power to imprison for Three Years previous to the Trial, which could not be borne. The Usage of the Navy might have made it the Duty of the Commander in Chief, in a Case where it did not speak so strongly for itself; how it becomes his Duty, is to be shewn in Evidence, in Proof of the Averment that it was his Duty; and after Verdict finding that it was his Duty, must be taken to have been sufficiently proved. It must also be taken to have been proved, that there was no Impediment in the Way; and under these Circumstances, the not holding a Court Martial, and the Plaintiff's having sustained Loss and Damage thereby, both which Circumstances we must consider as proved, constitute a good Cause of Action, upon which Judgement may be now given.

The Court are therefore of Opinion, that the Rule for arresting this Judgement is to be discharged.

Prize Money, but we are obliged to settle it as far as it is incidental to this Cause, and for the Purpose of this Cause; and concerning that, we hold in this Cause, that the Plaintiff, by reason of his Defendant and Henry, did lose the Prize Money which he would have gained from the Plaintiff by the said Defendant's action, and consequently that it is well alleged as special Damage in this Action.

It is objected to the Third Count of the Declaration, the Grievance of which is the refusing and neglecting to hold a Court-Martial for the Trial of the Plaintiff while the Defendant was under the Defendant's Command, and thereby keeping him under Arrest till his Trial is given; that this is a Grievance, and that the Law has fixed no Term of Time of Three Years within which Courts-Martial are to be held; and therefore it could not be the Duty of the Commander to hold a Court-Martial at any Time within that Period, or as soon as he reasonably and conveniently could after the Charge exhibited, and consequently that the Defendant, that the Defendant may be reasonably and conveniently have held a Court-Martial, and that the Defendant, wrongfully and injuriously, and contrary to his Duty, omitted, neglected, and refused to hold such Court-Martial, cannot give to the Plaintiff a Cause of Action. The Answer to this Objection is, that every Branch of a public Duty working Wrong and Loss to another, is an Injury, and actionable; that the Three Years is only a limitation of Time, beyond which no Court-Martial can be held; that with which it may be the Duty of those who have Power to hold Courts-Martial, to hold them within a much shorter Space; it is a manifest Objection of Power of various Kinds, that they should be exercised within a reasonable Time, Suspension and Arrest being incident to the Power of holding a Court-Martial, it seems an essential Incident in such a Power, and absolutely necessary to qualify the Rigor of it, that it should be exercised in a reasonable Time, otherwise a Power of holding a Court-Martial would necessarily involve in it a Power to suspend for Three Years previous to the Trial, which could not be borne. The Usage of the Navy might have made it the Duty of the Commander in Chief, in a Case where he could not speak so strongly for himself, how it becomes his Duty, is to be taken in Evidence, in Proof of the Argument that it was his Duty; and after Verdict finding that it was his Duty, and he failed to have these things done, it must also be taken to have been proved, that there was no impediment in the Way; and that the Circumstances, the not holding a Court-Martial, and the Plaintiff's having sustained Loss and Damage thereby, both which Circumstances we must consider as proved, constitute a good Cause of Action, upon which Judgment may be now given.

The Court are therefore of Opinion, that the Rule for setting aside the Judgment is to be discharged.

ROSE DISCERNED.